Court File No. C69603

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant
(Respondent in Appeal)

-and-

TRIGGER WHOLESALE, INC., THE EN CADRE GROUP INC.,
MARK GDAK, JAIMEE LYNN GDAK and JAIMAK REAL PROPERTIES INC.

Respondents
(Jaimee Lynn Gdak Appellant in Appeal)

FACTUM OF THE RESPONDENT, CLEARFLOW COMMERCIAL FINANCE CORP.

September 29, 2021

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TO: **THE SERVICE LIST**

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PART I - OVERVIEW

1. The Appellant, Jaimee Lynn Gdak ("**Jaimee**"), appeals the Superior Court Order of the Honourable Justice Dietrich (the "**Motion Judge**"), dated May 26, 2021 (the "**Order**"), in which the Motion Judge found that an unlimited and continuing, personal guarantee (the "**Guarantee**") executed by the Appellant Jaimee to be valid, binding and enforceable. Pursuant to the Guarantee, Jaimee guaranteed repayment of the full amount of indebtedness of the Respondent, Trigger Wholesale Inc. ("**Trigger**") in favour of the Respondent, Clearflow Commercial Finance Corp. ("**Clearflow**"),

2. Clearflow submits that the Appellant has failed to identify any significant legal error by the Motion Judge justifying appellate intervention. The Motion Judge applied well-settled legal principles to the facts in determining that the Guarantee is valid and binding. The Appeal should be dismissed.

3. The Appeal arises from an application, commenced in October, 2020 in which Clearflow requested a number of Orders arising from a massive, pre-meditated fraud perpetrated over a number of years against Clearflow by the Appellant, Mark Gdak, and possibly others (the "**Application**"). The extent of the fraud against Clearflow runs into the tens of millions of dollars.

4. The proceeding appealed from on this Appeal was a motion within the context of the Application, in which Clearflow requested that the Court grant one element of the relief requested by Clearflow in the Notice of Application - namely, judgment against Jaimee and her husband (the Respondent Mark Gdak) in respect of personal guarantees executed by them relating to certain indebtedness owed by Trigger to Clearflow (the "**Motion**").

5. The fraud forms a necessary part of the overall narrative, but the Motion Judge was not asked to make a finding in that regard. Rather, the Motion related solely to liability of Mark and Jaimee pursuant to the personal guarantees.

6. The Motions Judge found that both Mark (who did not file materials or take a position on the Motion below, and did not defend or deny his involvement in the fraud in respect of the Application generally) and Jaimee (who strenuously denied both involvement in the fraud and liability pursuant to her guarantee) are liable to Clearflow for the full amount of the Trigger indebtedness pursuant to their guarantees.

7. Jaimee appeals that decision to this Honourable Court, alleging various errors on the part of the Motions Judge. Clearflow respectfully submits that the decision of the learned Motions Judge was based on reasonable findings of fact, amply supported by the evidence. The Motion Judge's Reasons for Decision evince no palpable and overriding error in principle or of law, and even on a standard of review of correctness, which Clearflow submits is not the appropriate standard on this Appeal, the decision of the Motions Judge is manifestly correct.

PART II - FACTS

The Parties

8. Clearflow is a federally-incorporated Canadian company that has been in business for the past seven (7) years of providing financing to medium-sized businesses in Ontario, typically through factoring of accounts receivable. Occasionally, Clearflow extends other types of credit facilities to its customers in addition to the factoring of accounts receivable.[1]

[1] Affidavit of Martin Rees sworn October 9, 2020 (the "**First Rees Affidavit**"), Respondent's Compendium ("**RC**"), Tab 4, p.106**,** para. 2.

9. The Respondent Trigger Wholesale, Inc. ("**Trigger**") was one of Clearflow's customers pursuant to three separate credit facilities, summarized below. Trigger is an Ontario-incorporated company that was in the business of importing and distributing firearms and associated ammunition to customers throughout Canada. Trigger's customers allegedly included small gun shops, the military, police forces and large retailers, specifically, Canadian Tire and Home Hardware.[2]

The Credit Facilities Extended by Clearflow to Gdak

10. In 2014, a Clearflow partner, Martin Rees, who has over 35 years experience in banking in the U.K. and Canada, was introduced to Gdak by a common contact who was familiar with Trigger's business potential. Gdak subsequently discussed with Mr. Rees the possibility of Clearflow extending credit facilities to Trigger, partly to retire prior indebtedness of Trigger in favour of another lender.[3]

11. Mr. Rees took the lead in conducting due diligence in respect of Trigger on behalf of Clearflow. He learned that Gdak had commenced the business as a sole proprietorship in 2012 and incorporated it in 2014. Mr. Rees also learned that the firearms distribution business in Canada is heavily regulated by both the federal and provincial governments, as well as the OPP and the RCMP. It typically takes a two-year period to acquire and establish the necessary licenses, distribution agreements and delivery channels before one can commence business as a firearms distributor in Canada.[4]

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[2] First Rees Affidavit, Tab 4, p. 107, para. 5, and Excerpt from Trigger website, Rees Affidavit, Exhibit "D", Tab 4D, page 166b.
[3] First Rees Affidavit, RC, Tab 4, pp. 108 & 112, paras. 9 and 20.
[4] First Rees Affidavit, RC, Tab 4, p. 112 para. 21.

12. Given the specialized and heavily-regulated nature of this business, Clearflow was attracted to Trigger on the basis that the barriers to entry in this industry are considerable, and Trigger had spent the time and money to gain the required licenses, approvals, relationships and experience necessary to become a profitable company with positive long-term prospects. Accordingly, a committee consisting of all partners of Clearflow decided to put forward an offer of financing to Trigger.[5]

13. The credit facilities extended by Clearflow to Trigger were summarized in an Offer letter, dated April 23, 2015 (the "**Offer Letter**"), and consisted of:

(a) a Master Purchase and Sale Agreement dated April 30, 2015 (the "**MPSA**");

(b) a Master Purchase Order Financing Agreement dated April 30, 2015 (the "**PO Financing Agreement**"); and

(c) a Royalty Agreement dated April 30, 2015 (the "**Royalty Agreement**").[6]

14. As part of the overall package of loan and security documents executed by the parties on April 30, 2015, Mark and Jaimee, who are each officers and directors of Trigger,[7] executed separate, unlimited, continuing guarantees (the "**Guarantees**") of the full amount of the indebtedness of Trigger in favour of Clearflow.[8] Jaimee's Guarantee is the one at issue on this Appeal.

15. Under the terms of the MPSA and the standard terms which form part thereof, Trigger was

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[5] First Rees Affidavit, RC, Tab 4, p. 113 para. 23
[6] First Kanichis Affidavit, RC, Tabs 5A, 5B and 5C, pp. 215-218, 221-226, and 229-267 at Exhibits "A", "B" and "C".
[7] Corporation Profile Reports, Exhibits "E", "F" and "G", RC, Tabs 4E, 4F, and 4G, pp. 168-173, 176-180, and 183-187, First Rees Affidavit.
[8] Guarantees, Exhibit "A", RC, Tab 4A, pp. 129-131, First Rees Affidavit.

required to provide Clearflow with a monthly list of all outstanding invoices issued by it to its customers. Clearflow then had the option to purchase all or a portion of these accounts receivable based on a payment to Trigger of 85% of the amounts shown as due and outstanding.[9]

16. Clearflow then collected those receivables indirectly from Trigger's customers, supposedly on 30-60 day payment terms. In reality, however, most of these "customers" were not customers of Trigger at all. The factored invoices rendered to these customers, and purchase orders received from them, were faked by Gdak and possibly others.[10]

17. Unless and until Clearflow receives payment in respect of its financed purchase orders, any funds advanced to Trigger are considered loans outstanding from Clearflow to Trigger. To secure this temporary indebtedness in favour of Clearflow, pending receipt of payment of the purchased accounts by Trigger's customers, Trigger executed a general security agreement in favour of Clearflow,[11] which was duly perfected by registration pursuant to the Ontario *Personal Property Security Act*.[12]

Trigger's False Financial Statements Provided to Clearflow

18. Following the execution of the Credit Facilities in April, 2015, the factoring relatitonship between Clearflow and Trigger continued for a period of approximately five and one-half years, between April, 2015 and September, 2020. During this period, Clearflow was Trigger's primary operating lender and first-ranking secured creditor.[13] In 2019, Trigger represented to Clearflow

[9] First Kanichis Affidavit, RC, Tab 5, p. 205, para. 5
[10] First Rees Affidavit, RC, Tab 4, p.109, para. 10(b)
[11] General Security Agreement, RC, Exhibit B, First Rees Affidavit, RC, Tab 4B, p. 134-142.
[12] *Personal Property Security Act* search printout, Exhibit C, First Rees Affidavit, RC, Tab 4C, pp. 145-165.
[13] First Rees Affidavit, RC, Tab 4, p. 106, para. 3.

that the total AR owed to it by all of its customers was, collectively, $64,074,258.69.[14] Trigger's 2019 financial statement, provided to Clearflow in June, 2020 indicated that Trigger's total sales in 2019 were in excess of $78 million.[15] Also in June, 2020, Gdak provided to Clearflow monthly, internally generated financial statements. The Court below found that the 2019 financial statements and the monthly, internally-generated statements for 2020 were inaccurate.[16]

19. As of October 6, 2020, Clearflow had purchased almost-entirely phoney accounts from Trigger, or extended financing based on mainly fake purchase orders allegedly placed by customers of Trigger, with a total value of $42,943,931.75, which it obviously can never collect upon.[17] In addition, further advances were made to Trigger totalling an additional $5,600,000.00, for financing various business purposes, based on forged real estate documents that made it appear that Trigger or a company related to it owned significant real property in Waterloo, Ontario.[18]

Clearflow Unable to Recover $48M Owed to it by Trigger

20. As of October 6, 2020, being the date referenced in the initial Affidavits of Clearflow personnel sworn in support of the Application, the total amount owed by Trigger in favour of Clearflow was, $48,543,931.75. This amount consists of the total of the purchased accounts

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[14] First Kanichis Affidavit, RC, Tab 5, p. 205, para. 7.

[15] Trigger 2019 Financial Statement, First Kanichis Affidavit, Exhibit "D", First Kanichis Affidavit, RC, Tab 5D, pp. 270-288; Second Report of the Receiver, RC, Tab 3, p.39, para. 15.

[16] Trigger 2019 Financial Statement, First Kanichis Affidavit, Exhibit "D", First Kanichis Affidavit, RC, Tab 5D, pp. 270-288; Second Report of the Receiver, RC, Tab 3, p.42**,** para. 32; Reasons for Judgment of the Honourable Justice Dietrich, dated May 26, 2021 ("**Motion Judge Decision**"), RC, Tab 2, p.13, para. 32.

[17] Trigger 2019 Financial Statement, First Kanichis Affidavit, Exhibit "D", First Kanichis Affidavit, RC, Tab 5D, pp. 270-288; Second Report of the Receiver, RC, Tab 3, p.43, para. 35.

[18] Trigger 2019 Financial Statement, First Kanichis Affidavit, Exhibit "D", First Kanichis Affidavit, RC, Tab 5D, pp. 270-288; Second Report of the Receiver, RC, Tab 3, p.43, para. 36.

receivable and financed purchase orders, which is $42,943,731.75, which cannot be recovered by Clearflow (as a result of the fact that those invoices and purchase orders were fictitious forgeries).

The Fraud

21. The extent of the fraud was extensive and far-reaching. It took place over five years, and was perpetrated or supported, in part, through falsified invoices; a forged transfer of real property; fake email addresses; falsified emails allegedly sent by representatives of well-known, national Canadian retailers; falsified firearms storage inspection certificates allegedly issued by the Ontario Government; a falsified Real Property Agreement of Purchase and Sale; impersonations of executives employed by Canadian Tire and Home Hardware stores; and phony cheques.[19]

22. Mark even went so far as to create an elaborate hoax in late 2019 / early 2020, including a photo of Jaimee at her mother's bedside in hospital, to the effect that his mother-in-law, Jaimee's mother, died after a lengthy illness and hospitalization; this fabrication was for the purpose of buying time to provide already-late (and fraudulent) financial reporting to Clearflow. Jaimee's mother is, in fact, alive and well.[20]

23. From the outset of the relationship, Mark insisted that Clearflow modify its normal lending and verification procedures, including modifications that allowed him to commit the fraud.[21]

24. The fraud involved a form of cheque kiting against Clearflow, in which invoices were forged and presented to Clearflow for purchase. The proceeds of each batch of falsified invoices

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[19] First Rees Affidavit, RC, Tab 4, p. 109-110, para. 10.
[20] Affidavit of Martin Rees sworn November 26, 2020 (the "**Second Rees Affidavit**"), RC, Tab 6, p.301-303, paras. 31-37 and Photo of Jaimee Gdak, Exhibit "M", Second Rees Affidavit, RC, Tab 6D, p. 323.
[21] First Kanichis Affidavit, RC, Tab 5, p.205-206, para. 8.

purchased by Clearflow were deposited into an account held by Trigger, which then drew cheques against that account in favour of itself, and deposited those cheques into a "blocked" account in the name of Trigger. The Gdaks would then provide periodic update emails to Clearflow, falsely advising Clearflow that the blocked account contained funds that constituted payments received from its false customers.[22] The funds in this blocked account were then swept by Clearflow and applied against the outstanding invoices that it had purchased.[23]

25. In reality, none, or very little, of the funds deposited into the blocked accounts originated from customers. The vast majority, if not all, of the funds deposited into the blocked account consisted of funds received from Clearflow representing the purchase of the next batch of invoices or purchase orders, re-circulated by cheque into the blocked account.[24]

26. Thus, the entire fraud depended on Clearflow always purchasing an ever-growing value of accounts receivable, the proceeds of which were simply re-circulated back to Clearflow, less a substantial sweep off the top which permitted the Gdaks to enjoy a well-heeled lifestyle. This included a Range Rover automobile, expensive jewellery, multiple watercraft with a value over $800,000, a cottage, several investment properties, and multiple all terrain vehicles.[25]

Superior Court Orders Against Trigger and Related Companies

27. Immediately upon discovering the fraud, Clearflow issued written demand for repayment and Notices of Intention to Enforce Security ("**NITES**") to Trigger, Mark and Jaimee, and brought

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[22] Second Rees Affidavit, RC, Tab 6, p.292-293, para. 8.
[23] Second Rees Affidavit, RC, Tab 6, p.293, para. 9.
[24] Second Rees Affidavit, RC, Tab 6, p.293, para. 10.
[25] Second Rees Affidavit, RC, Tab 6, p.293, para. 11.

this application for, among other things, the appointment of Grant Thornton Limited ("**GTL**") as interim receiver over the assets and undertaking of Trigger.[26]

28. On October 13, 2020, Clearflow sought and obtained from the Honourable Justice Gilmore, an Order appointing GTL as Interim Receiver over Trigger and a related company, The En Cadre Group Inc.[27]

29. Clearflow also sought and obtained, as part of the Order issued by Justice Gilmore, a Mareva injunction against Mark and Jaimee, which restricted their rights to deal with their personal assets pending final adjudication of this matter.[28]

30. On October 22, 2020, the Honourable Mr. Justice McEwen appointed GTL as a full, National Receiver over Trigger pursuant to s. 243 of the *Bankruptcy and Insolvency Act* with all of the usual powers granted to a Receiver in such circumstances.[29] The Mareva provisions included in the Order of Gilmore J. were incorporated into Justice McEwen's October 22, 2020 Order.[30] The Mareva Injunction continues in force.

31. Mr. Rees states in his Second Affidavit that the Receiver did issue one Report to Court in its capacity as Interim Receiver, prior to its appointment as full Receiver.[31] Mr. Rees acknowledged that the Interim Receiver's findings were preliminary in nature and GTL had not completed a full investigation into these matters at the time that it issued the First Report of the

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[26] Demand and NITES, Exhibit "H", First Rees Affidavit, RC, Tab 4H, p.190-201.
[27] Interim Receivership Order of Gilmore J. dated October 13, 2020, Second Report of the Receiver, Appendix 1 **["Interim Receivership Order of Gilmore J**."], RC, Tab 3A, pp. 70-83.
[28] Interim Receivership Order of Gilmore J., RC, Tab 3A, pp.74-75, paras. 8-11.
[29] Receivership Order of McEwen J. dated October 22, 2020, Second Report of the Receiver, Appendix 4 ["**Receivership Order of McEwan J.**"], RC, Tab 3B, p.85-103.
[30] Receivership Order of McEwan J., RC, Tab 3B, p.90-91, paras. 8 -11.
[31] Second Rees Affidavit, RC, Tab 6, p.300, para. 29.

Interim Receiver. Notwithstanding those caveats, Mr. Rees cites the following passage from GTL's First Report to Court:

> The preliminary investigation conducted by the IR has revealed that Trigger's management, specifically, Mr. Gdak, Mrs. Gdak and Mr. Searles, appears to have been involved in the following activity:
>
> - Entering false customer sales and payments to Trigger's accounting records;
> - Creating email accounts to impersonate Canadian Tire and Home Hardware employees;
> - Preparing false customer cheques on false CIBC, BNS and RBC accounts and providing same to Clearflow, as evidence of customer payments;
> - Providing false AR information to Clearflow; and
> - Falsifying letters from the CFO and providing such falsified letters to Clearflow.

The Property Owned by the Gdaks Obtained with Monies Advanced by Clearflow

32. Since its appointment, the Receiver has investigated various issues, including the disposition or location of millions of dollars defrauded from Clearflow. The Receiver has discovered that Jaimee and Jaimak Real Properties Inc. ("**Jaimak**"), a real estate holding company owned and operated by Jaimee, hold title to high-end watercraft and motor vehicles, expensive jewellery and four separate real properties located in Waterloo Ontario, and in Huron County, Ontario, all of which were directly acquired by Trigger with moneys advanced by Clearflow to Trigger based on the fraudulent claims and forgeries.[32]

33. Pursuant to the Order of the Honourable Justice Dietrich, dated March 8, 2021, the Court has declared all of this property, real and personal, to constitute assets of Trigger (rather than Jaimee or Jaimak, in whose name title was placed), and therefore, under the control of the receiver,

[32] Second Report of the Receiver dated Feb. 12, 2021, RC, Tab 3, pp. 50-60, paras. 88 -157

to be liquidated by the Receiver to satisfy the claims of the creditors of Trigger (of which Clearflow is overwhelmingly the largest).

This Appeal in Context: The Gdaks Three-Year, Continuing Campaign to Remove Jaimee from Liability under he Guarantee

34. Since approximately 2018, the Gdaks have been desperately pressuring Clearflow to release Jaimee from her Guarantee,[33] including numerous and repetitive emails and telephone calls from Mark to Clearflow representatives. These efforts have continued to the present day, including this Appeal. Clearflow consistently refused to consider releasing Jaimee as part of an overall restructuring of the Trigger loan facilities, until a number of due diligence items were satisfied. Unfortunately, these due diligence items never were satisfied. The restructuring never occurred.[34]

35. The constant requests and pressure for the release of the Guarantee occurred at the same time (roughly 2018 through 2020) that Mark (and Clearflow alleges, Jaimee as well) were at the height of their fraudulent activities. It is submitted that the timing of these two events is not coincidental. It would be considerably easier for the Gdaks to conceal, and more difficult for Clearflow to recover, the proceeds of the fraud if Jaimee was released from her Guarantee.

The Guarantees Are Valid

36. A number of "transactional" details of the Guarantees are not disputed. Neither Jaimee nor Mark deny signing the Guarantees. They do not take the position that the signatures that appear on the Guarantees are not theirs, nor do they claim that the Guarantees were signed under duress.

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[33] Second Rees Affidavit, RC, Tab 6, pp.292 and 295-298, paras. 6 and 15-24
[34] *Ibid*, para. 14.

There is no evidence to suggest, nor does Jaimee claim, that she did not know what she was signing or the legal effect of her Guarantee.

37. On the Motion giving rise to this Appeal, the Motion Judge noted that Trigger, Mark and Jaimee were represented by legal counsel, Brian Kelly, in respect of the transaction.[35] Jaimee does not allege that she received inadequate legal advice, that her lawyer misled her in any material way, or that her lawyer's advice was negligent.

Jaimee's Positions before the Court Below

38. Jaimee took the position before the Motion Judge, and asks this Honourable Court to find, that a combination of factors should lead to the Court releasing Jaimee from liability pursuant to the Guarantee, or that such liability should be pegged at a much lower level than it really is. These factors included Jaimee's alleged lack of sophistication, the fact that her lawyer also represented other parties to the transaction, the increase in the total loan amount over the five years of the parties' financial relationship (allegedly without Jaimee's knowledge or consent), and the language used in the Guarantee itself.

Jaimee's "Hands On" Role at Trigger

39. Jaimee's positions on this Appeal are predicated on the Court accepting a characterization of Jaimee that is inconsistent with the evidence. Jaimee attempts to cast herself as an unsophisticated spouse who signed a personal guarantee of the debts of her husband's business; she alleges no involvement with the business and no benefit or consideration to her whatsoever.

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[35] Motion Judge Decision, RC, Tab 2, p.11, para. 13.

Further, it is submitted that Jaimee's argument presupposes that anyone with less than a high school level of education cannot read and understand a standard form personal guarantee.

40. However, the evidence before the Motion Judge demonstrates quite the opposite regarding Jaimee's role and level of sophistication with respect to Trigger. Specifically, Jaimee took a "hands on" role at a very senior level in all aspects of Trigger's business. This is particularly so with respect to those aspects of Trigger's business such as the collection of accounts receivable and cheque deposits that were most related to the fraud itself.

41. Literally thousands of emails were exchanged[36] between Jaimee and the Clearflow administration team with respect to[37]:

(i) processing credit card payments;

(ii) deposits made into the Trigger Ops Account and the Trigger Blocked Account;

(iii) deposits made into BMO Bank Trigger Ops Account that consisted of non factored payments; and

(iv) funding requests to Clearflow.[38]

42. Jaimee also had cheque-signing authority for Trigger.[39] If one conducts a Google search against Jaimee, a Trigger Zoom info page comes up as one of the first entries.[40] A corporate and organizational chart provided by Trigger to Clearflow shows Jaimee as the "Co-owner and SVP" of Trigger, on the same management level as Mark Gdak himself. These charts show that Jaimee

[36] Affidavit of Sandy Kanichis (the "**Second Kanichis Affidavit**") sworn November 26, 2020, RC, Tab 7, p. 326, para. 4.
[37] Second Rees Affidavit, RC, Tab 6, p. 298-299, para. 27.
[38] First Kanichis Affidavit, RC, Tab 5, p. 210, para. 21.
[39] Second Kanichis Affidavit, RC, Tab 7, p. 324, para. 13.
[40] First Kanichis Affidavit, RC, Tab 5, p. 211, para. 23.

was the sole owner of the Gdak real estate company, one of the main components of the Trigger corporate structure. In Mr. Gdak's words: "Jaimee Gdak is my wife and business partner. She is 50% co-owner of the company (the new operations company and holding company)".[41] In addition to her account-collection and banking functions, Jaimee attended meetings and was present for numerous conference calls with Clearflow personnel during which she participated directly in discussions of high-level, operational issues.[42]

43. Jaimee had access to, and did access, the "Cadence" software, used by Clearflow and its customers for real-time updates respecting the state of the customer's financial position with Clearflow, including a standard opening screen that showed the total amount of all purchased invoices which had not yet been collected, and for which the customer is liable if Clearflow cannot collect.[43]

44. As an officer and director of Trigger, Jaimee was subject to a statutory duty pursuant to the Ontario *Business Corporations Act* to review and approve the annual financial statements of Trigger. The 2019 Trigger financial statements for the year ending March 31, 2019 show a debt owed to Clearflow in the form of "Loan Payable" in the amount of $21,362,343. Note 5 to the 2019 Financial Statement provides:

> Advances calculated on accounts receivable are based on a rate of up to 85% of the aggregate net face value of identified accounts. Clearflow has the option to factor receivable with

[41] Second Rees Affidavit, RC, Tab 6, p. 298, para. 26, and corporate organizational chart, being Exhibit "H", Second Rees Affidavit, RC, Tab 6A, pp.308-309.
[42] Second Rees Affidavit, RC, Tab 6, p. 298, para. 26 and emails attached as Exhibit "L" Second Rees Affidavit, RC, Tab 6C, pp.316-320.
43 Further Reply Affidavit of Sandy Kanichis sworn March 9, 2021 (the "**Third Kanichis Affidavit**"), RC, Tab 8, pp. 334-336, Cadence Opening Screen Printout, Third Kanichis Affidavit, Exhibit "B", Third Kanichis Affidavit, RC, Tab 8B, p.343; confirmatory email that Jaimee had logged onto Cadence, Third Kanichis Affidavit, Exhibit "A", Third Kanichis Affidavit, RC, Tab 8A, p.340.

> recourse. Balance outstanding at year end totalled $21,362,343 on eligible accounts receivable of $26,438,422…**Clearflow and the Company continued to re-evaluate and increase the respective threshold for lending on an ongoing basis**"[44] [**emphasis added**]

45. Jaimee took a direct role in the deposit of cheques, collection of accounts receivable and funding requests from Clearflow. She was, at times, the point person for Trigger in dealing with funding requests from Clearflow. She signed cheques from Trigger to be deposited into the Clearflow sweep account amounting to millions of dollars.[45] Even if Jaimee is "unsophisticated", which Clearflow disputes, no facts were apparent to Clearflow at the time that the Guarantee was signed that would put Clearflow on notice that there was a need for Jaimee to receive independent legal advice. Clearflow was aware that Jaimee was an officer and director of Trigger (which means in and of itself, in most circumstances, that independent legal advice was not necessary), and was aware of the information that had been provided by the Gdaks as set out above.

The Motion Judge Enforces the Personal Guarantees of Mark and Jaimee

46. In the context of the above factual matrix, the Motions Judge ultimately enforced the personal Guarantees against Mark and Jaimee. The Motion Judge further held that:

(a) Jaimee is not unsophisticated.[46] The fact that she did not complete high school did not equate to a lack of sophistication, or indicate a lack of intelligence or an inability to read and comprehend a one-page guarantee, written in the second person;[47]

(b) On a balance of probabilities, Jaimee was not entirely unaware, or uninformed as to, the debt that Trigger was incurring.[48] While Jaimee may not have not known that Trigger's liability to Clearflow exceeded $48 million, it is more likely than not that she knew that her liability on her Guarantee exceeded the original $900,000

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[44] 2019 Trigger Financial Statement, First Kanichis Affidavit, Exhibit "D", RC, Tab 5D, p. 270-288.
[45] Second Rees Affidavit, RC, Tab 6, p.298, para. 27(a) and copies of Cheques, Exhibit "I", Second Rees Affidavit, RC, Tab 6B, p.312-313
[46] Motion Judge Decision, RC, Tab 2, p.19 at para. 71.
[47] Motion Judge Decision, RC, Tab 2, p.18 at para. 62.
[48] Motion Judge Decision, RC, Tab 2, p.19 at para. 71.

loan amount by a considerable margin. [49] Moreover, it ought to have been apparent to Jaimee on February 21, 2018 (being the one date on which it can be confirmed that Jaimee accessed the Cadence software, and would have seen the opening screen containing the outstanding balance, to the penny) that her liability on her Guarantee far exceeded the original $900,000 loan limit;[50]

(c) There was no merit to Jaimee's allegations that she did not have a title at Trigger or that she took on only administrative roles there;[51]

(d) Jaimee's evidence that she was not aware that she was a director of Trigger was not credible;[52]

(e) Jaimee was represented by counsel, Mr. Kelly, who was present when the Guarantee was signed and signed the document as "witness." Jaimee had ample opportunity to consult with Mr. Kelly for clarification or explanation;[53]

(f) Jaimee did not meet her onus of showing an inequality of bargaining power and a resulting improvident bargain; [54]

(g) The Guarantee transaction was not tainted by the presence of unconscionability or improper tactics;[55] and

(h) The Guarantee was not released as a result of the fact that the amount of overall loan limit was increased over the six-year financial relationship between the parties.[56]

47. Jaimee now seeks to have the above factual findings overturned on this Appeal.[57]

PART III - ISSUES AND LAW

48. This Appeal gives rise to a single issue: did the Motion Judge make a palpable and overriding error in enforcing Jaimee's personal Guarantee?

[49] Motion Judge Decision, RC, Tab 2, p.22 at para. 88.
[50] Motion Judge Decision, RC, Tab 2, pp.21-22 at para. 87.
[51] Motion Judge Decision, RC, Tab 2, p.20 at para. 74.
[52] Motion Judge Decision, RC, Tab 2, p.21 at para. 82.
[53] Motion Judge Decision, RC, Tab 2, p.23 at para. 94.
[54] Motion Judge Decision, RC, Tab 2, p.23 at para. 95.
[55] Motion Judge Decision, RC, Tab 2, p.23 at para. 95
[56] Motion Judge Decision, RC, Tab 2, pp.23-27 at paras. 96-118.
[57] Notice of Appeal, dated June 23, 2021, RC, Tab 1, pp.1-7.

A. The Motion Judge Made no Palpable and Overriding Error in Enforcing Jaimee's Personal Guarantee

49. The Motion Judge's findings of fact or mixed fact and law are entitled to significant deference on appeal and cannot be reversed absent palpable and overriding error.[58] To the extent that the Motion Judge's findings involve issues of contractual interpretation and the factual matrix in which the Guarantee was executed, Clearflow submits that this Appeal raises questions of mixed fact and law, subject to the deferential standard of palpable and overriding error.[59]

50. Jaimee's position on this Appeal that the Guarantee constitutes a "standard form" contract so as to attract a correctness standard of review is misplaced. In *Ledcor*, the 2016 decision of the Supreme Court of Canada on which the Appellant relies,[60] the Court established that in order for correctness review to apply to the interpretation of a contract, three requirements must be met: (i) the appeal must involve the interpretation of a standard form contract; (ii) the interpretation at issue is of precedential value; and (iii) there is no meaningful factual matrix that is specific to the parties to assist the interpretation process.[61]

51. On this Appeal, at least two of these three requirements are absent. The factual matrix was not only relevant, but of significant assistance to the Motion Judge in the process of interpreting the Guarantee, as set out below. Moreover, this Appeal has no precedential value – the Guarantees are specific to the parties and no extricable legal question may be derived from their interpretation

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[58] *Housen v. Nikolaisen*, 2002 SCC 33, per Iacobucci and Major JJ. at paras. 10 & 28.
[59] *Sattva Capital Corp*. v. *Creston Moly Corp*., 2014 SCC 53, per Rothstein J. at paras. 52; *Corner Brook (City) v. Bailey*, 2021 SCC 29, per Rowe J. at para. 44.
[60] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, per Wagner J.
[61] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, *supra* at para. 24.

in this case. Simply put, the interpretation of the Guarantees will have no effect on the well-established principles of contractual interpretation applied to them.

52. Accordingly, Clearflow submits that the Motion Judge's Order is entitled to significant deference on appeal. For the reasons set out below, Jaimee has failed to show that the Motion Judge committed a palpable and overriding error justifying appellate intervention. Alternatively, Clearflow submits that the Motion Judge's Order nonetheless survives scrutiny, even on a standard of review of correctness..

i. No Palpable and Overriding Error Regarding Independent Legal Advice to Jaimee

53. Ontario Courts have consistently held that a lack of independent legal advice is not, in and of itself, a defence to a guarantee claim, where the guarantor is an officer and director of the corporation whose liabilities are being guaranteed. [62] Absent undue influence, unconscionability, fraud, misrepresentation or evidence supporting a defence of *non est factum,* the lack of independent legal advice, on its own, is not fatal to a claim on a guarantee.[63]

54. In this case, the Motion Judge found that Jaimee had the opportunity to consult with a lawyer, or to ask a lawyer for clarification or explanation, given that the Guarantee was signed in the presence of Mr. Kelly, who witnessed the document.[64] The fact is that Jaimee was represented

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[62] *Meridian Credit Union v 2428128 Ontario Limited*, 2017 ONSC 4578, per Maddalena J. at para 23, aff'd 2018 ONCA 201, per curiam; *Toronto-Dominion Bank v 1503345 Ontario Ltd.*, [2006] O.J. No. 1960 (Sup. Ct.), per DiTomaso J. at para. 22.

[63] *See* *RBC v. 164393 Ont. Inc.*, 2019 ONSC 5145, per Williams J. at para. 54, varied on other grounds, 2021 ONCA 98, per Roberts J.A., citing *Bank of Montreal v. Featherstone*, [1989] O.J. No. 613 (C.A.), per curiam.

[64] Motion Judge Decision, RC, Tab 2, p. 23, at para. 94

by counsel, namely, Mr. Kelly, in connection with the Guarantee transaction. Jaimee has not suggested that Mr. Kelly was biased, misled her, or gave her incomplete or incorrect legal advice.

55. It is respectfully submitted that the Motion Judge did not make any error in finding that the fact that Jaimee received legal advice in respect of the transaction was one factor that the Court could take into consideration in deciding to enforce the Guarantee against Jaimee. Contrary to Jaimee's position, the Motion Judge held that the evidence demonstrated Mr. Kelly acted as Jaimee's lawyer:[65]

> In my view, [**Jaimee] was not a director in name only**. Nor do I find that she performed only administrative tasks at Trigger or that she had no knowledge of the increase of the indebtedness of Trigger to the applicant, such that her dealings with the applicant are tainted by unconscionability.
>
> **I am also not satisfied that [Jaimee] did not have the opportunity to review her Guarantee with counsel**. All the credit facility documents were signed **in the presence of and witnessed by a lawyer, Mr. Kelly, of Kelly & Co**. [Jaimee] asserts that Mr. Kelly was the lawyer for Trigger and not her lawyer. However, in her examination, when questioned about documents relating to the sale of a condominium owned by her, in September 2020, and in particular about the reference to "Kelly & Co." on the agreement of purchase and sale, [Jaimee] stated that **"they are our lawyers**"…[66][**emphasis added**]

56. On this Appeal, Jaimee's position regarding the *independence* of that legal advice may have some relevance if the Motions Judge found, as a fact, that certain other factors were present in the factual matrix that would lead the Court to question the Guarantee - for example, if there was a finding that Jaimee was unsophisticated; that the Guarantee was an "accommodation guarantee" signed by Jaimee for the benefit of her husband; that Jaimee derived no benefit from the Guarantee herself; that Jaimee was not an officer and director of the principal borrower; that she did not take an active part in Trigger's business at a senior level; or that the terms of the

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[65] Motion Judge Decision, RC, Tab 2, p.19, paras. 65.
[66] Motion Judge Decision, RC, Tab 2, p.23, paras. 93-94.

Guarantee itself are unconscionable or arose from improper tactics on the part of Clearflow. The Motions Judge made no such finding.

57. Accordingly, the Motion Judge made no palpable and overriding error regarding Jaimee's argument that she was not given an opportunity to obtain independent legal advice on the Guarantee or any amendments to the credit arrangements.

ii. No Palpable and Overriding Error Re the Validity of Jaimee's Guarantee

58. Clearflow submits that, contrary to Jaimee's position on this Appeal, the size of the type-face used in a contract is neither determinative of, nor even relevant to its enforceability. What is relevant is whether the contract is fraudulent, contains a misrepresentation, or contains a very onerous term that a reasonable person would not expect, coupled with very small print that would make it difficult to take note of the surprisingly onerous term. As the Superior Court held in its 2009 decision, *Aviscar Inc v Muthukumaru*:

> **The law is that if a person signs a contract without reading it, that person is bound by the terms of the contract. That is the general rule.** There are exceptions if the signing person can establish that there was fraud, misrepresentation, or there was a very onerous term that a reasonable person would not expect to be in the contract.[67] [**emphasis added**]

59. In this case, the Motion Judge held that Jaimee failed to meet her onus of showing an that the transaction was somehow unconscionable:

> [Jaimee] has not met her onus to show an inequality of bargaining power and a resulting improvident bargain. **I am not persuaded that [Jaimee's] Guarantee transaction was tainted by the presence of unconscionability or improper tactics** such that the applicant ought to have been put on notice of such and encouraged her to obtain independent legal advice.[68] [**emphasis added**]

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[67] *Aviscar Inc* v *Muthukumaru*, [2009] O.J. No. 2894 (Sup. Ct.), per Matheson J. at para 23. *See also* *Forest Hill Homes* v *Ou*, 2019 ONSC 4332, per Morgan J. at para. 21.
[68] Motion Judge Decision, RC, Tab 2, p.23, para. 95.

60. There is no evidence that the Guarantee in this case contains any clauses that are surprising; unexpected; or particularly onerous or uncommon in relation to other Guarantees. Clearflow further submits that the consumer protection considerations underpinning the exceptions to the general rule set out in *Aviscar* are not applicable to commercial transactions where, as here, there is no imbalance of bargaining power and the party attacking the contract was represented by legal counsel. This was not a case in which Jaimee was asked to sign a standard form car rental agreement without being given the chance to read it before signing.

61. Accordingly, the Motion Judge made no palpable and overriding error in upholding the validity of the Guarantee.

iii. No Palpable and Overriding Error Re Jaimee Signing Off on the Financial Statements

62. Subsection 159(1) of the *Ontario Business Corporations Act* (the "***OBCA***")[69] required the board of directors of Trigger, which consisted of Jaimee and Mark, to consider and to approve the annual financial statements.[70] S. 159(1) of the OBCA further requires one of the Directors to sign the financial statements themselves.

63. Further, subsection 134(1) of the *OBCA* required Jaimee to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Subsection 134(2) of the *OBCA* also required Jaimee to comply with all applicable sections of the *OBCA*, which would include the requirement of the Board of Directors to review and approve the financial statements.[71] S.

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[69] R.S.O. 1990, c.B.16 at s.159(1).
[70] *OBCA, supra* at s.159(1).
[71] *OBCA, supra* at s.134.

64. In this case, the Motion Judge expressly held that, as a director, Jaimee "would have been required to sign off on the financial statements for these companies. The annual financial statements would have reflected the indebtedness to [Jaimee], which would have been easy for her to track year over year".[72] The Motion Judge further noted that "[a]s a director [Jaimee] was responsible for signing off on the financial statements of [Trigger and En Cadre], which would have disclosed the companies' indebtedness".[73]

65. It is respectfully submitted that Jaimee has misinterpreted the law in respect of a director's duty in Ontario regarding the financial statements issued by a corporation. Whether or not Jaimee was the particular director who "signed" the financial statements pursuant to s. 159(1) of the *OBCA* is irrelevant. She was still required to have participated in the consideration and approval of the financial statements, as required by the *OBCA*. It may be assumed that any director of an Ontario corporation has reviewed the financial statements of the corporation and that any such director is familiar with the general financial position of the corporation (including, at least approximately, the amount it owes to its principal operating lender). No director should be permitted to rely on their own breach of their statutory and fiduciary duties to the corporation by claiming ignorance of the contents of the corporation's financial statements, over a period of several years.

66. In the alternative, it submitted that even if this Honourable Court is not prepared to find that, as a director, Jaimee is *deemed* to be familiar with the contents of the financial statements, and to be generally familiar with the financial position of the corporation, there is no basis to

[72] Motion Judge Decision, RC, Tab 2, p.18, para. 61.
[73] Motion Judge Decision, RC, Tab 2, p.19, para. 71.

interfere with the factual finding of the Court below that it is simply not believable in the circumstances of this case that Jaimee was not *actually* familiar with same.

iv. No Palpable and Overriding Error Re Change in Terms to the Guarantee

67. It has long been the law that while a material change to the terms of the principal indebtedness can result in a release of the guarantee, parties may contract out of the protection that releases a guarantor from liability where the creditor and debtor agree to a material change in terms without the guarantor's consent.[74] In this case the Motion Judge held that the parties did exactly that:

> In my view, the parties contracted out of this protection. The language of the Guarantee is unequivocal. It clearly states that [Jaimee's] liability would be continuing and unaffected by any change in the amount of the "Obligations". In respect of her obligations, paragraph 2 reads: "you guarantee payment to us on demand, of all present and future lease payments and obligations, conditional sale instalments and obligations, and any other debts and liabilities…"
>
> The extent of [Jaimee's] liability is plainly stated in paragraph 3 of the Guarantee. There it states, in block capitals, that her liability is "CONTINUING" and that it will not be limited, reduced, or otherwise affected by "any change in the terms or amount or existence of the Obligations"…[Jaimee] agreed to these terms.[75]

68. Over the five-year period during which Clearflow provided financing to Trigger, the terms and conditions of the credit facilities extended by Clearflow never changed in any way that is not specifically authorized by the Guarantee itself or in any way that was not known to Jaimee.

69. While it is true that the authorized loan limit was gradually increased over time, the Motion Judge found that a relevant factor in this analysis was whether Jaimee was aware that the loan limit had increased, but took no steps to limit her exposure on the Guarantee. As the Motion Judge

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[74] Motion Judge Decision, RC, Tab 2, p.16, para. 51, citing *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), per Abella J.A. (as she then was).
[75] Motion Judge Decision, RC, Tab 2, p.17, paras. 52-53.

stated in her Reasons, after carefully reviewing the evidence: "…I find that it ought to have been apparent to Ms. Gdak on February 21, 2018 that her liability exceeded the original $900,000 loan shown on the credit facility documents by a considerable margin…she took no steps to try to limit her exposure on the Guarantee".[76]

70. Even if Jaimee was not aware of the increases in the loan limit, which, it is submitted, and the Motions Judge found, is not credible, the definition of the "Obligations" guaranteed contained in paragraph 1 of the Guarantee makes it clear that the Guarantee is intended to be a "continuing guarantee", for all obligations and indebtedness of Trigger owed in favour of Clearflow. The Guarantee in this case is not specifically tied to any one document or loan limit. In fact, there is no monetary limit contained anywhere in the Guarantee.

71. In s. 3 of the Guarantee, Jaimee specifically acknowledged that she would remain liable under the Guarantee for any obligations of Trigger, howsoever arising, notwithstanding any change to the "terms, **or the amount**, or the existence" of the guaranteed obligations [**emphasis added**]. S. 7 of the Guarantee (reinstatement of Guarantee even if loan Obligations are reduced to zero at any one time), supports Clearflow's interpretation of the Guarantee. In other words, the Guarantee itself contemplated that the indebtedness of Trigger could be increased by the parties, to any amount, regardless of the original loan limit, without affecting the validity of the Guarantee. Even if the indebtedness went down to zero, the Guarantee still applied to further advances made by Clearflow to Trigger as long as the Guarantee remained in force.

72. Ontario Courts have made it clear that held that this type of clause is valid and enforceable and serves to prevent the release of the guarantee in exactly this situation. In its 2013 decision,

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[76] Motion Judge Decision, RC, Tab 2, p.21-22, paras.87-88

Royal Bank of Canada v. Samson Management & Solutions Ltd.,[77] this Honourable Court observed that "the purpose of a continuing all accounts guarantee is to allow the customer and the lender to alter their business arrangements without having to involve the guarantor".[78] The Court held:

> In my view, while the subsequent advances by RBC to Samson were material alterations to the principal loan contract, they were contemplated by the parties, permitted by the clear language of the guarantee, and inherent in a continuing all accounts guarantee that contemplates increases in the size of the underlying indebtedness. Further, clause (1) of the guarantee expressly permitted RBC to change the terms of the borrowing, which would include changes in performance standards…Thus, despite the material alterations in the underlying loan arrangements, Ms. Cusack's personal guarantee remains enforceable given the clear and unambiguous language of the guarantee and the factual context.[79]

73. Similarly in *Royal Bank of Canada v. Adecon Transport Inc.,*[80] the Superior Court considered a form of guarantee that is materially similar to the one in the case at bar. The Court found that the defendants had provided personal "continuing all accounts guarantees" and that the creditor in that case, Royal Bank of Canada, had no duty to inform the guarantor about future credit facilities. The onus was on the guarantor to inquire about the state of accounts.[81] Subsequent, additional loan obligations were not "material alterations to the principal contract", but, as in this case, were contemplated by the parties in the Guarantee itself.[82]

74. On this Appeal, Jaimee argues that even if the increase in the loan limit over time did not *per se* result in the release of the Guarantee, then this clause nonetheless constitutes a "surprisingly onerous" term, in a small font size, that ought to have resulted in a positive obligation on Clearflow

[77] 2013 ONCA 313, per Lauwers J.A. at para. 32, leave to appeal to the Supreme Court of Canada denied [2013] S.C.C.A. No. 301.
[78] *Royal Bank of Canada v. Samson Management & Solutions Ltd.*, 2013 ONCA 313 at para 32 .
[79] *Samson Management, supra* at para 63.
[80] *Royal Bank of Canada v. Adecon Transport*, [2004] O.J. No. 6249 (Sup. Ct.), per Echlin J. at paras. 11-12.
[81] *Adecon Transport, supra* , at para. 14.
[82] *Adecon Transport, supra* at para. 15.

to recommend independent legal advice. Jaimee argues that this clause, in and of itself, is unconscionable if not specifically brought to the attention of the guarantor and their independent lawyer. Clearflow submits that this common type of guarantee clause is neither "surprising" or "unconscionable" in any way. Certainly, the Appellant did not lead expert evidence to suggest that s. 3 of the Guarantee is not common in guarantees in Canada. In fact, the opposite would appear to be true: this type of clause has been repeatedly reviewed by Courts in Canada, as set out above, making it difficult to infer that this type of clause is not common in guarantees of this type. Not one Court has held, or observed *in obiter*, that a clause similar to s. 3 of the Guarantee is unconscionable or unfair, or leads to the necessity of the guarantor receiving independent legal advice from a lawyer acting solely for them. To the contrary, as shown above, this type of clause has been held to be valid and binding by the Courts.

v. No Palpable and Overriding Error by Motion Judge in Interpreting the Guarantee

75. The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[83] Commercial contracts, in particular, should be interpreted in accordance with "sound commercial principles" and "good business sense" to avoid any commercial absurdities.[84]

[83] *Sattva v. Creston Moly Corp., supra* at para. 47; *see also* *Corner Brook (City) v. Bailey, supra* at para. 20.
[84] *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, per Winkler C.J.O. at para. 16; *see also* *Old Navy (Canada) Inc. v. Eglinton Town Centre Inc.*, 2019 ONSC 3740, per Quigley J. at para. 168, appeal dismissed on consent 2020 ONCA 679, per curiam.

76. The Guarantee in question includes the following wording:

> In consideration of Clearflow Commercial Finance Corp….dealing with or continuing to deal with the Customer [Trigger], you [Jaimee] guarantee payment to us on demand, of all present and future lease payments and obligations, conditional sale instalments **and other debts and liabilities** (collectively, the "Obligations") both direct and indirect, (whether incurred alone or jointly with others, whether absolute or contingent, whether matured or not matured, and whether for principal, interest or fees) payable to us by the Customer under any and all Master Purchase and Sale Agreements and Special Provisions, lease agreements, conditional sale contracts, **credit facilities**, overdrafts, guarantees, letters of credit, indemnities together with all costs and expenses, including legal fees and expenses, incurred by us in connection with its connection with the Customer. [**emphasis added]**

77. First, on the plain and ordinary meaning of the words, any reasonable person would interpret the above definition of "Obligations" to include "other debts and liabilities" payable by Trigger under any "credit facilities" advanced by Clearflow in favour of Trigger. It is respectfully submitted that the above definition is not ambiguous. There is no need to resort to the doctrine of *contra preferentum* in order to interpret the meaning of the above definition of "Obligations". As the Motion Judge held in rejecting the application of *contra proferentem* to the Guarantee:

> Accordingly, **I find that a narrow interpretation of the terms of the Guarantee is not warranted in this case**. Had I decided this point differently, **I would nonetheless have rejected [Jaimee's] interpretation of the definition of "Obligations" in the Guarantee.** "Obligations" is defined to include "all present, and future lease payments and obligations, conditional sale instalments and obligations, and any other debts and liabilities". [Jaimee] submits that the *ejusdem generis* interpretation maxim ought to apply such that "any other debts and liabilities" must be read narrowly to include only debts of the same class or kind, being debts of a similar nature to lease payments and conditional sale instalments, and that the application has led no evidence that falls into that class.
>
> **I reject this highly technical interpretation**. **I agree with the applicant that the phrase "other debts and liabilities" covers each of the credit facilities that the applicant offered and provided to Trigger**…**This is the only logical interpretation of the Guarantee** **considering the factual matrix at the time the credit facility documentation**, including the Guarantees, was executed.[85] [**emphasis added**]

78. Clearflow submits that the Motion Judge made no palpable and overriding error in her interpretation of the Guarantee above. There were no leases or conditional sales contracts between Clearflow and Trigger at any time, nor is there is any evidence that the parties contemplated

[85] Motion Judge Decision, RC, Tab 2, p.18, paras. 63-64.

entering into such agreements in the future. There is no evidence that Clearflow was even in the business of leasing or financing by way of conditional sales agreements. As such, the general wording that follows the terms "leases" and "conditional sales contracts" cannot possibly mean only "debts and liabilities" arising out of, or similar to leases or conditional sales contracts, as Jaimee proposes on this appeal. The result of the application of the doctrine of *esjudem generis* and *contra proferentem* as Jaimee proposes would lead to the absurd result that Jaimee guaranteed obligations of Trigger that never existed and were never contemplated. In effect, according to Jaimee, she guaranteed nothing. It is submitted that this is obviously not what the parties intended.

79. Given the wording and the context of the transaction, the obvious purpose of the Guarantee, and the intention of the parties, was that Jaimee would guarantee all obligations of Trigger in favour of Clearflow arising from any credit facilities advanced by Clearflow to Trigger. Accordingly, the Motion Judge made no palpable and overriding error in rejecting Jaimee's interpretation of the Guarantee.

vi. No Palpable and Overriding Error Regarding the Acceptance of Evidence

80. In *Royal Bank of Canada v. 164397 Ontario Inc.*[86] this Honourable Court has held that, on a Motion for Summary Judgment, where the Motions Judge weighs the credibility of a witness or rejects that witness' written testimony, the Motions Judge is required to explain the basis on which he or she is doing so. In *Royal Bank*, the Court observed that the plaintiff bank had filed no other evidence but the guarantees themselves and the evidence of the bank loan manager. There was no evidence available to the Court in the form of transcripts of cross examination that would have shed light on the parties' allegations. Before rejecting the appellants' evidence on this contested

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[86] *Royal Bank of Canada v. 164397 Ontario Inc.* 2021 ONCA 98.

point, the motion judge ought to have weighed the evidence, evaluated it, or made findings of credibility. As the Court held, the motion judge "could not simply prefer one position over another without providing an explanation that insufficient for appellate review."

81. It is respectfully submitted that the Motions Judge's Reasons for Decision, which run to 19 single-spaced pages, contain an exhaustive review of the evidence given by each witness, and a thorough analysis of that evidence. In every instance where the Court refused to accept certain evidence given by Jaimee, the learned Judge was very careful to provide a detailed explanation as to the basis for doing so. It is submitted that the Reasons for Decision make it clear that the Court carefully considered and applied the principles set out by this Court in *Royal Bank*.

PART IV - ADDITIONAL ISSUES

82. The Respondent raises no additional issues on this Appeal.

PART V - RELIEF REQUESTED

83. For the reasons set out above, Clearflow requests that this Honourable Court dismiss this Appeal in its entirety, with costs to Clearflow to be paid by Jaimee personally.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of September, 2021.

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Court File No. C69603

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant
(Respondent in Appeal)

-and-

TRIGGER WHOLESALE, INC., THE EN CADRE GROUP INC.,
MARK GDAK, JAIMEE LYNN GDAK and JAIMAK REAL PROPERTIES INC.

Respondents
(Jaimee Lynn Gdak Appellant in Appeal)

CERTIFICATE

I estimate that 2.5 hours will be needed for the oral argument of the Respondent, ClearFlow Commercial Finance Corp. on the appeal, not including reply. An Order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 29th day of September, 2021.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Housen v. Nikolaisen*, 2002 SCC 33, per Iacobucci and Major JJ.
2. *Sattva Capital Corp*. v. *Creston Moly Corp*., 2014 SCC 53, per Rothstein J.
3. *Corner Brook (City) v. Bailey*, 2021 SCC 29.
4. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, per Wagner J.
5. *Meridian Credit Union v 2428128 Ontario Limited*, 2017 ONSC 4578
6. *Toronto-Dominion Bank v 1503345 Ontario Ltd*., [2006] O.J. No. 1960 (Sup Ct J)
7. *RBC v. 164393 Ont. Inc.*, 2019 ONSC 5145, per Williams J. varied on other grounds, 2021 ONCA 98, per Roberts J.A.
8. *Bank of Montreal v. Featherstone*, [1989] O.J. No. 613 (C.A.), per curiam.
9. *Aviscar Inc* v *Muthukumaru*, [2009] O.J. No. 2894 (Sup. Ct.), per Matheson J.
10. *Forest Hill Homes* v *Ou*, 2019 ONSC 4332, per Morgan J.
11. *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), per Abella J.A.
12. *Royal Bank of Canada v. Samson Management & Solutions Ltd*., 2013 ONCA 313, leave to appeal to the Supreme Court of Canada denied [2013] S.C.C.A. No. 301.
13. *Royal Bank of Canada v. Adecon Transport Inc*., [2004] O.J. No. 6249 (Sup Ct J).
14. *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, per Winkler C.J.O.
15. *Old Navy (Canada) Inc. v. Eglinton Town Centre Inc.*, 2019 ONSC 3740, per Quigley J., appeal dismissed on consent 2020 ONCA 679, per curiam.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

s. 134(1) Ontario Business Corporations Act:

Standards of care, etc., of directors, etc.

134 (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,
(a) act honestly and in good faith with a view to the best interests of the corporation; and
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. R.S.O. 1990, c. B.16, s. 134 (1); 2006, c. 34, Sched. B, s. 24.

Duty to comply with Act, etc.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement. R.S.O. 1990, c. B.16, s. 134 (2).

Ss. 159(1) and (2), Ontario Business Corporations Act:

Approval by directors

159 (1) The financial statements shall be approved by the board of directors and the approval shall be evidenced by the signature at the foot of the balance sheet of any director authorized to sign and the auditor's report, unless the corporation is exempt under section 148, shall be attached to or accompany the financial statements. R.S.O. 1990, c. B.16, s. 159 (1); 2010, c. 16, Sched. 5, s. 1 (2).

Publishing, etc., copies of financial statements

(2) A corporation shall not issue, publish or circulate copies of the financial statements, referred to in section 154 unless the financial statements are,
(a) approved and signed in accordance with subsection (1); and
(b) accompanied by the report of the auditor of the corporation, if any. R.S.O. 1990, c. B.16, s. 159 (2).

CLEARFLOW COMMERCIAL FINANCE CORP.
Applicant (Respondent in Appeal)

-and-

TRIGGER WHOLESALE, INC. et al.
Respondents (Jaimee Lynn Gdak Appellant in Appeal)

Court File No. Court File No. C69603

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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RCP-E 4C (May 1, 2016)